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In the Supreme Court

of the United States

No. 388

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellee.

v.

HERBERT C. BARKER and
ELIZABETH S. BARKER,
husband and wife,

Appellants.

On Appeal from the Supreme Court of the State of Oregon

MOTION TO AFFIRM OR DISMISS

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the decree of the Supreme Court of the State of Oregon be affirmed, or in the alternative that the appeal from such decree be dismissed on one or both of the following grounds:

1. The appeal does not present a substantial federal question.

2. The substantial federal question, if present, was not properly raised in the State Court proceedings.

STATEMENT

This is an appeal by appellants from a decree of the Oregon Supreme Court affirming a Decree of the Circuit Court of the State of Oregon for Clackamas County, foreclosing a mortgage on certain property owned by appellants, which decree included the award of a deficiency judgment against appellants in the event that the proceeds of the foreclosure sale were less than the amount awarded to appellants in the decree.

The note and mortgage involved were executed on April 11, 1955, by William Saari and Elizabeth Saari. On March 21, 1959, appellants signed an earnest money receipt agreeing to purchase the mortgaged property from William Saari and Elizabeth Saari and to assume the existing mortgage thereon. This purchase by appellants was closed by Kronberg Bros. Realty, the realtor involved. On April 8, 1959, a deed to the property was recorded in Clackamas County, Oregon, running from William Saari, et ux, to appellants. The deed was recorded at the request of Kronberg Bros. Realty and returned to them after recording. However, subsequent to this recording Kronberg Bros. Realty declined to deliver the deed to appellant Herbert C. Barker, because of their claim that Mr. Barker owed them $47.64 in closing costs.

During the early part of 1959 James R. Moore of the law firm of Mautz, Souther, Spaulding, Kinsey & Williamson (hereinafter referred to as the "Mautz firm") became the attorney for Herbert C. Barker in connection with a dispute with one Walter Martin.

In July, 1960, the Mautz firm received instructions from appellee to foreclose the subject mortgage. Shortly thereafter the representative of the Mautz firm in charge of such foreclosure (not James R. Moore) ascertained that Barker was, or had been, represented by the Mautz firm. Consequently, filing of the foreclosure complaint was withheld until the Mautz firm was satisfied that complete termination of their relationship with Herbert C. Barker had been accomplished and that no conflict of interest would exist as a result of the Mautz firm representing appellee. The complaint was filed September 14, 1960. On October 18, 1960, appellants' new attorney, Robert G. Hawkins, made an offer on behalf of appellants to reinstate the subject mortgage. On October 21, 1960, the deed in favor of appellants which had been recorded April 8, 1960, was receipted for by Herbert C. Barker through his attorney, Robert G. Hawkins. A reinstatement agreement concerning the subject mortgage between appellants and appellee was signed on or about November 2, 1960. However, as appellants did not perform the terms of the reinstatement agreement, the foreclosure suit was again pursued, resulting in a trial before the Circuit Court of the State of Oregon for Clackamas County on April 7, 1961, and the decree in question.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Although appellants' jurisdictional statement sets forth three questions as being presented, careful analysis reveals that appellants are relying on only one point, namely: That the representation of appellee by counsel alleged to have formerly represented appellants in the same matter, constitutes a violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Appellee and its attorneys have vigorously denied, both in the trial court and in the Oregon Supreme Court and do so now in the Supreme Court of the United States, the existence of a conflict of interest resulting from the alleged representation by the Mautz firm of appellants in the same matter. Appellee's contentions in this regard have been affirmed, in effect, by the trial court and the Oregon Supreme Court. Be that as it may, even assuming for the benefit of argument that the Mautz firm had represented appellants in the same matter prior to the filing of the foreclosure suit, and that the Mautz firm represented appellee in the foreclosure suit, such does not constitute a violation of due process clause of the Fourteenth Amendment to the Federal Constitution.

There is a rather substantial body of law concerning the propriety and effect of an attorney representing an interest adverse to that of a former client, many of which cases are cited in an annotation on that subject

in 52 A.L.R.2d 1243. Appellee makes no argument with the firmly established general rule that an attorney who has acted for one client in a matter cannot thereafter undertake representation of a client in the same matter, whose interests are adverse to those of a former client. This rule is most often said to be grounded upon the confidential relationship which exists between attorney and client, the courts taking the view that by imposing this disability upon the attorney, confidential information conveyed by the former client is protected from disclosure and wrongful use. However, in reviewing the large number of cases cited in the 52 A.L.R.2d annotation and also those cited in a prior annotation on the same point in 51 A.L.R. 1307 appellee has found no case in which any court has held or even discussed the possibility that the existence of an adverse interest in violation of the rule constitutes a violation of due process of law. Admittedly, in many cases the judgment has been reversed by the appellate court based upon the existence of an adverse interest in counsel and in other cases disciplinary measures or injunctive action have been taken against the attorneys involved. But this action has been taken not because of a violation of due process. In *State of Kansas* v. *Leigh*, 178 Kan. 549, 289 P.2d 774 (1954) the Court held that it is an inviolate rule long established in the canons of ethics of the legal profession and by judicial opinion thtat an attorney cannot represent conflicting interests and that this rule is designed to protect confidential information from being used against a former client. The judicial decisions clearly indicate the basis for the rule as being the desire

to protect the former client from the use against him in a subsequent matter of information which he may have given to the attorney in confidence as a result of the prior relationship.

Appellee contends that the use of such confidential information by an attorney in a subsequent piece of litigation, however unethical or morally wrong, is not a violation of due process, for the use of such information merely results in additional facts being presented to court to assist it in arriving at the proper result. It cannot be said that due process is violated by the placing before the court of all available information concerning the litigation being tried. Of course, the information placed before the court might be inadmissible because of being obtained in a manner repugnant to another prohibition of Federal or State law, as, for example, information obtained through an unlawful search and seizure, but in the case at bar no allegation is made that the alleged utilization of confidential information by appellee's counsel is anything but a violation of due process.

Actually, of course, as presented to the trial court and the Oregon Supreme Court, the record reveals no information of any kind utilized by appellee which was of necessity obtained through the fact that the Mautz firm formerly represented appellants. Appellee's case was a simple matter of proving a mortgage default and appellants' assumption thereof. The existence of the default under the note and mortgage has never been questioned and was easily provable with facts in no way based upon any information which might have been

given by appellants to the Mautz firm. Evidence concerning the delivery of the deed upon which the deficiency judgment was based was derived from obvious witnesses (the realtor and Robert G. Hawkins) readily available to all parties. The identification of and testimony by these witnesses was in no way dependent upon nor derived through confidential information, if any, obtained by the Mautz firm from appellants. The trial transcript proves this beyond question.

THE SUBSTANTIAL FEDERAL QUESTION, IF ANY, WAS NOT PROPERLY RAISED IN THE COURTS BELOW

Rule 15 (1)(d) of this Court states that a petitioner seeking review of a state court decision must "specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised * * *".

In appellants' jurisdictional statement they set forth that the federal questions were presented by various objections before the trial court and the Oregon Supreme Court to the effect that it was improper for appellee to use appellants' own attorney against them.

As the briefs and all arguments before state courts are not ordinarily part of the record filed with the Supreme Court, they cannot be used to establish that a federal question was raised. *Lynch* v. *New York, ex rel Pierson*, 293 U.S. 52, 55 S. Ct. 16 (1934). Consequently, appellants' claim that the federal questions were raised

in their brief to the Oregon Supreme Court has no effect upon the jurisdiction for this appeal.

A review of the trial court transcript cited by appellants, of the Motion for New Trial cited by appellants and of appellants' brief to the Oregon Supreme Court, as well as the decision of the Oregon Supreme Court, fails to reveal any specific allegation whatsoever that the Fourteenth Amendment to the Constitution of the United States was violated in any manner by the proceedings in question. In *Bowe* v. *Scott*, 233 U.S. 658, 34 S. Ct. 769 (1914) it was held that an averment that property was taken "without due process of law", making no reference to the Constitution of the United States, and asserting no express rights thereunder, is solely referrable to the State Constitution and affords no basis whatever for invoking the jurisdiction of the United States Supreme Court. Article I, Section 10 of the Constitution of the State of Oregon provides for due process of law, as follows:

> "SECTION 10. *Administration of Justice*: No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him and his person, property or reputation."

Consequently, any reference by appellants to "due process" or "fair trial" must be deemed to have reference to the above quoted due process clause of the Oregon Constitution and the due process rights afforded appellants under Oregon law.

In *F. G. Oxley Stave Co.* v. *Missouri*, 17 S. Ct. 709,

(1897) the court held that the Supreme Court of the United States cannot review a final judgment of a state court, even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appears from the record that such title, right, privilege or immunity was "specially set up or claimed" in the state court as belonging to such party under the Constitution or some treaty, statute, commission or authority of the United States.

Appellee is aware of the leniency granted to litigants without counsel in applying the requirement that the federal question be raised in the state court. However, it is submitted that anyone granting leeway to appellants due to their lay status must remain aware of the fact that the trial in the trial court was conducted by appellant, Herbert C. Barker, and of his preparation in the trial court of an answer, a motion for postponement of trial date, a motion for new trial on seven different grounds, of his preparation of all necessary papers regarding the appeal from the trial court to the Oregon Supreme Court, including notice of appeal, numerous motions for extension of time and orders approving same, answering paper in opposition to motion for dismissal of appeal, petition for instructions and ruling, appellants' abstract of record and brief (25 pages in length) and appellants' reply brief (6 pages in length), to say nothing of the jurisdictional statement filed in this Court. Consequently, it is inconceivable that in this case appellate jurisdiction was properly conferred by the Fourteenth Amendment being first specifically referred to in the jurisdictional statement filed herein.

It is recognized that failure to raise the federal question below may be made moot by consideration of the federal question by the Oregon Supreme Court. However, to do so the opinion must explicitly or impliedly recognize the presence of a federal question and render a decision thereon. Stern and Gressman, Supreme Court Practice, Third Edition (1962). Examination of the opinion reveals that the Oregon Supreme Court merely indicated that the trial judge was cautious to protect appellants' rights in every way and that the trial was fair. This language does not constitute recognition of a federal issue. Under the *Bowe* decision cited above, reference that the trial was fair must be deemed to have been a decision that the trial was fair under the Oregon Constitution and the laws of the State of Oregon.

CONCLUSION

Appellants have clearly failed to show that a substantial federal question is involved and have also clearly failed to show that even if a substantial federal question is involved, that the question was properly raised in the lower court proceedings. Appellants have received fair and impartial administration of justice from the courts of the State of Oregon. There is no jurisdiction for appeal of this mortgage foreclosure decree to the Supreme Court of the United States. Appellee requests affirmance of the decree and opinion of the Oregon Supreme Court, or dismissal of the appeal, whichever the Court deems applicable.

Respectfully submitted,

KENNETH E. ROBERTS,
Attorney for Appellee,
Metropolitan Life Insurance
Company.